

**IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
CIRCUIT DIVISION**

MARCIA GREEN,

Plaintiff,

VS.

Case No. 15BA-CV02239

MEHRDAD FOTOOHIGHIAM, et al.

Defendants.

PARTIAL SUMMARY JUDGMENT

Comes now the Court this date and enters its order sustaining partial summary judgment as follows:

The plaintiff has pleaded that the named defendants committed numerous torts against her by causing her mobile home to be burned while she was sleeping in it and as a result she was damaged. The torts alleged are negligence/or reckless conduct; assault; battery; intentional infliction of emotional distress; negligent infliction of emotional distress; trespass to realty; malicious trespass; and conspiracy. Plaintiff now claims by way of a motion for summary judgment that she is entitled to judgment as a matter of law.

Summary judgment may be entered if the moving party shows that (1) there is no genuine dispute as to the material facts; and (2) the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W. 2d 371 (Mo. banc 1993) and *Rule 74.04 Missouri Rules of Court*. Where the facts underlying the right to judgment are beyond dispute, summary judgment is proper. *Farrow v. Brown*, 873 S.W. 2d 918, (Mo. App. E.D. 1994). If summary judgment is not proper to dismiss the entire suit, a trial court may still issue partial summary judgment on those claims in which there is no genuine issue of material fact. *Saslow Dental- St. Louis v. Jones*, 751 S.W. 2

396 (Mo. App. 1988). The requirements of the rule governing the form of the response to a summary judgment motion are mandatory. *Wehmeyer v. FAG Bearings Corp.*, 190 S.W. 3d 643 (Mo. App. S.D. 2006). Where a response to a motion for summary judgment fails to admit or deny each factual statement in the motion, the factual assertions contained within the motion are deemed true. *Rycraw v. White Castle Systems, Inc.*, 28 S.W. 3d 495 (Mo. App. E.D.) and *Reese v. Ryan's Family Steakhouses, Inc.*, 19 S.W. 3d 749 (Mo. App. S.D. 2000). That rule further requires that a response to a motion for summary judgment shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of the movant's factual statements. "This allows a reviewing court, whether it is the trial court or the appellate court, to clearly understand precisely which facts the non-movant disputes". *Wehmeyer v. FAG Bearings Corp.*, 190 S.W. 3d 643 (Mo. App. S.D. 2006).

The pertinent parts of Rule 74.04(b) (2), require that the response shall admit or deny each of the movant's factual statements in numbered paragraphs that correspond to the movant's numbered paragraphs. The response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial. *Wehmeyer*, supra. A response by affidavit may be sufficient. *Williams v. Highway and Transp.*, 16 S.W. 3d 605 (Mo. App. W.D. 2000).

The plaintiff has presented her statement of uncontroverted facts. The Defendants did not timely reply and the plaintiff is entitled to summary judgment if her uncontroverted evidence, if true as to the ultimate issues in the case, support a judgment as a matter of law. This recitation of the rule indicates that depositions of parties are sufficient to support a summary judgment motion.

It is also noted that the plaintiff wishes the Court to assume that because the defendant invoked his right to remain silent under the United States Constitution that the Court is free to assume that the statement is harmful to the defendant. The plaintiff has presented authority for the proposition that deposition questions not answered by the defendant on the grounds of self-incrimination under the 5th Amendment to the United States Constitution may be considered in summary judgment proceedings in civil cases. See *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W. 3d 619 (Mo. App. W.D. 2004).

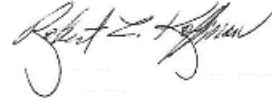
The Court has read the statement of uncontroverted facts submitted by the plaintiff which recite that defendant Fotoohigham admitted to a Mr. Louis Spano that he paid a Mr. Reed and defendant Hall to burn plaintiff's trailer. Mr. Scotty Christopher stated that defendant Fotoohigham offered defendant Hall and himself \$500 to set plaintiff's mobile home on fire. Defendant Fotoohigham actually paid Mr. Christopher \$500 to set plaintiff's mobile home on fire. All these averments are supported by deposition testimony. Defendant does not deny any of these facts; he merely claims that deposition testimony cannot be used to support them. The Court determines that deposition testimony may be used in support of facts alleged sufficient to allow for summary judgment. *Supreme Court Rule 74.04(c)(1)*.

The Court also considers the failure to answer deposition questions by defendant Fotoohigham on the grounds that to do so would violate his right to remain silent under the 5th Amendment to the United States Constitution and assumes that the answers are adverse to him. *Johnson, supra*.

The evidence presented has not been denied as required under Supreme Court Rule 74.04 (c) (1). The undenied facts are that defendant Fotoohigham paid others in a conspiracy to burn down the dwelling of the plaintiff. Those co-conspirators did burn that dwelling down causing

the plaintiff damage. There is no contravention of these ultimate issues. They are found to be true. The plaintiff is therefore entitled to judgment as a matter of law.

It is for these reasons that the Court enters partial summary judgment in favor of the plaintiff against defendant Fotoohighiam. The only issue left to decide is the measure of damages.



October 26, 2017

Robert L. Koffman
Judge

COURT SEAL OF



BOONE COUNTY